Case No. 85-1277

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE SCHOOL BOARD OF NASSAU COUNTY, FLORIDA; and CRAIG MARSH,
Individually and as Superintendent of Schools of Nassau County, Florida,

Petitioners,

---vs.---

GENE H. ARLINE,
Respondent.

ON WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONERS REPLY BRIEF

Brian T. Hayes
245 East Washington Street
Monticello, Florida 32344
904-997-3526

John D. Carlson
1030 East Lafayette Street
Tallahassee, Florida 32301
904-877-7191

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF CITATIONS

REPLY ARGUMENT

Pursuant to Rule 22.5, Supreme Court Rules, Petitioners reply to the Brief of Opposition filed by Respondent.

A. In her Brief, Respondent asserts that the issue in this case is premature and not ripe for consideration by this Court. Petitioners suggest that the matter is not only ripe but a series of cases and legislative enactments have already gone forward based on the decision of the 11th Circuit.

To wait for diverse opinions from various Circuit Courts or legislative bodies would only exacerbate confusion in an area of significant national concern. Specifically, since this decision has been rendered, it has been widely interpreted as precedent for AIDS cases. Recently, in an article appearing in the March, 1986 issue of the "Employment Relations Bulletin" (See Appendix A for full text), it was reported that the Executive Director of the Florida Commission on Human Relations has ruled that AIDS is a handicap within the meaning of the Florida Law. This journal reported (page 4) as follows:

> "In reaching his decision, Human Relations Commission Executive Director Donald Griffin found that:
>
> > 'Based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with acquired immune deficiency syndrome is within the coverage of the Human Rights Act of 1977 in that such an individual

> "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties.'

In support of this finding, Griffin cited *Arline v. School Board of Nassau County,* 772 F.2d 759 (11th Cir. 1985), which the *"CERL Bulletin"* previously noted could be the basis for a finding that AIDS is a handicap. That case involved the finding that tuberculosis, a communicable disease, was a handicap under the definition of the federal Rehabilitation Act of 1973 (See *Disease is Handicap Under Rehabilitation Act; May Impact on AIDS,* 21 *"CERL Bulletin"* 3 (December, 1985)). Griffin also found that Broward County had failed to establish that a requirement that a person not have AIDS is a bonafide occupational qualification (BFOQ) which would justify discrimination under the statute."

Additionally, the Florida Legislature is now considering legislation to define AIDS as a handicap, once again citing the *Arline,* supra, case as was reported in the lecture outlines of the *9th Annual Local Government Law in Florida Seminar.* (See appendix B) In that proposed legislation the case herein sought to be reviewed is cited as direct authority.

Certainly, Petitioners suggest, this case, although a Tuberculosis case, has become precedent as suggested in their Brief. (See page 18 of Petitioner's Brief) Therefore, they suggest that the time is now for the Court to accept this significant case and determine directly and clearly that infectious diseases are not "handicaps" within the meaning of Section 504, Rehabilitation Act of 1973.

B. Since this matter was originally briefed the issue of accomodation of a handicapped worker has been considered and reported in a District Court case in Maryland. In *Carty v. Carlin,* N-84-4565 D. Maryland (12/85), the Honorable Edward S. Northrup determined in construing Section 504 of the Rehabilitation Act of 1973, that an employer's duty to accomodate is limited to the employee's current job and does not include the right to a transfer to another job if accomodation in the current job is not feasible, even if the employee can perform the other job. This case is significant, Petitioners suggest, because the issue before this Court also is concerned with the Respondent's claims of entitlement to be transferred to a job where she would come in contact with "less susceptible individuals".

Petitioners now argue that the *Carty,* supra, case and its rationale, has direct bearing on the issues in this case and should be adopted by this Court. Although the *Carty,* supra, case appears to be one of first impression, it clearly demonstrates the confusion and uncertainty currently being experienced by Federal Courts throughout the country.

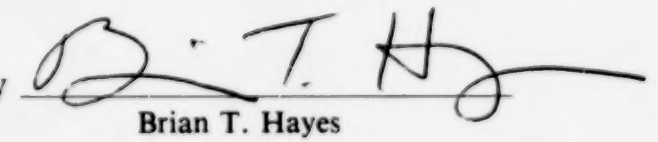
CONCLUSION

Because of the immediate significance of the issue in this case, Petitioners suggest that certiorari is proper and appropriate to resolve the issue herein raised.

Respectfully Submitted

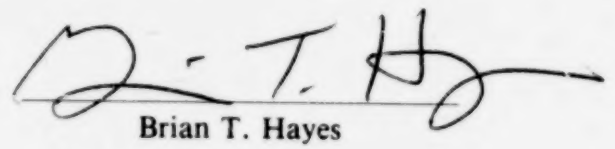
Brian T. Hayes
245 E. Washington Street
Monticello, Florida, 32344
904-997-3526

John D. Carlson
1030 E. Lafayette Street
Tallahassee, Florida 32301
904-877-7191

By 
Brian T. Hayes

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petitioners Reply Brief For Writ Of Certiorari was furnished by U. S. mail to George K. Rahdert, Esquire, 233 Third Street North, St. Petersburg, Florida 33701, Attorney for the Respondent this 28th day of March, 1986.



Brian T. Hayes

Appendix A

AIDS RULED HANDICAP IN FLORDA; NATIONAL EDUCATION URGED

In an important decision with possible national repercussions, the Executive Director of the Florida Commission on Human Relations has ruled that the disease AIDS is a handicap within the meaning of Florida law and that persons with the disease are thus protected from discrimination because they have it. The investigatory determination in the case of Todd Shuttleworth, a policy analyst for the Broward County Office of Budget and Management Policy until he was fired in September 1984 after his employer discovered that he had AIDS, was hailed by gay rights activists across the nation as an important victory.

Shuttleworth's employer never denied that he was discharged because he had AIDS. Instead, the county said that it was acting on the basis of a document prepared by the Florida Department of Health and Rehabilitative Services (HRS). The HRS document recommended that health care professionals who treated AIDS patients should avoid contact with those persons under certain circumstances, such as if the employee takes steroids daily, if they are pregnant, if they have certain known immune deficiency diseases, or if they have recently received chemotherapy.

In reaching his decision, Human Relations Commission Executive Director Donald Griffin found that:

> Based upon the plain meaning of the term "handicap" and the medical evidence presented, an individual with acquired

> immune deficiency syndrome is within the coverage of the Human Rights Act of 1977 in that such an individual "does not enjoy, in some manner, the full and normal use of his sensory, mental or physical faculties."

In support of this finding, Griffin cited *Arline v. School Board of Nassau County,* 772 F.2d 759 (11th Cir. 1985), which the *CERL Bulletin* previously noted could be the basis for a finding that AIDS is a handicap. That case involved the finding that tuberculosis, a communicable disease, was a handicap under the definition of the federal Rehabilition Act of 1973 (*See Disease is Handicap Under Rehabilition Act: May Impact on AIDS,* 21 *CERL Bulletin* 3 (December, 1985)). Griffin also found that Broward County had failed to establish that a requirement that a person not have AIDS is a bonafide occupational qualification (BFOQ) which would justify discrimination under the statute.

Griffin stated in conclusion that he was:

> mindful of the serious and important concerns of the employer, the other employees and the public. Based upon my review of this case, I do not find that Respondent was acting in bad faith when it made the decision to terminate Complainant; nevertheless, there is an absence of evidence to show with any reasonable probability that AIDS can be transmitted by casual contact that commonly occurs in the workplace.

Griffin futher noted that; "In so holding, I specifically refrain from resolving issues involving employment

Appendix A

decisions to reassign or alter the working conditions of employees with AIDS or decisions involving employees with transmissible infections." Also left unresolved are important issues concerning whether the Act covers persons in high risk groups or those who have tested positive for exposure to the virus but have not developed AIDS.

It is important to note that Broward County may still appeal the Executive Director's investigatory decision to the full Commission and can also appeal it in circuit court.

Shuttleworth's attorney, Larry Corman, said that the decision "sets a statewide precedent. It puts every employer in the State of Florida on notice that to discriminate solely because that individual has contracted AIDS constitutes an unlawful employment procedure which violates Florida statutes and subjects employers to liability for damages and attorney's fees." Corman has ask for $5 million dollars in compensatory damages for Shuttleworth.

Shuttleworth himself, reached in San Francisco where he now lives, was quoted in the *Miami Herald* as saying that the decision "is great news." He said that he was "never really that bitter, but I think the county was stupid. The more I see the evidence and statistics on AIDS, the more I conclude that people who think it's casually transmitted are just real dumb."

Ron Najman, spokesman for the National Gay Task Force in New York, was quoted by the *Herald* as saying

that "[w]e're very pleased with the decision" and that the "desire to fire people or throw them out of their apartments or fumigate their belongings — all this nonsense is based on the belief that AIDS is easy to catch. That's false."

Concern about the disease has been much in evidence across the nation in recent weeks. In Congressional testimony before the House Government Operations Subcommittee on Intergovernmental Relations and Human Resources, witnesses related tales of discrimination in Washington state, particularly Tacoma. Linda Taylor, director of the Seattle Office for Women's Rights, said that because of Seattle's strong antidiscrimination laws in employment, housing, and provision of city services to various protected groups, including gays, that many persons with AIDS or AIDS Related Complex (ARC) were moving to that city. Taylor's remarks were reported in the *Government Employee Relations Report* (23 *GERR* 1779 (1985)).

In San Francisco, the San Francisco AIDS Foundation has announced that more than half of the cost of an AIDS education package aimed at relieving the fears of employers and employees has been underwritten by area corporations, including Levi-Strauss & Co., Inc. and BankAmerica. The package will consist of written materials in English and Spanish, a videotape, and an educational program manual.

Back in Florida, another bill regarding the treatment of teachers and students with AIDS has been filed in the Florida Legislature. House Bill 137, introduced by Rep. Javier Souto (R-Miami), would allow the Florida

Appendix A

Department of Education to test district, private elementary, or secondary school teachers and students if it was found that there was "probable cause" that they had AIDS. The bill would also require infected students to be taken out of the general school population, but would allow them to remain in school and be taught by teachers with AIDS. Local school boards would also be empowered to terminate, with pay, teachers found to be infected with the disease. An earlier bill concerning AIDS in Florida Schools was filed by Sen. Don Childers (D-West Palm Beach) (*See CDC, NEA Issue AIDS Guidelines,* 22 *CERL Bulletin* at 2 (January, 1986)).

Further developments in the AIDS crisis, particularly with regard to Florida and how the workplace is affected, will be covered in future issues of the *CERL Bulletin.*

A-1 Excerpt from: *EMPLOYMENT RELATIONS BULLETIN,* Center for Employment Relations & Law, College of Law, Florida State University, Tallahassee, FL 32306, (March 1986, No. 24), p.4.

Appendix B

C. Legal status of an AIDS infected person

1. If AIDS is defined as a handicap, there can be no discrimination.
    a. If AIDS is a handicap, there can be protection by both federal and state antidiscrimination laws.
    b. In *Arline v. Nassau County School Board,* F.2d 1759 (11 Cir. 1986), a teacher with T.B. was declared to be handicapped under the Federal Rehabilitation Act.
    c. Based upon that decision, the Florida Commission on Human Relations has indicated that a city budget director with AIDS was handicapped. This case has not been reputed nor has it been reviewed judicially.
    d. If a handicap designation is upheld, employees would be protected by S.760,F.S. as well as the Florida constitution.
    e. Likewise students would be protected under the Federal Education For The Handicapped Act as well as the Florida constitution.

D. Pending Legislation

1. Senate Bill-44 (Fla.) This bill would:
    a. Require HRS to inform school boards of any student or employee with AIDS
    b. Authorizing school boards to test for AIDS
    c. Requiring segregation of students
    d. Requiring no employment of AIDS infected person in a cafeteria or food service.
2. Should AIDS be declared a handicap, Senate Bill-44 would probably be unenforcible as against federal and state law.

[A-B]Excerpt From: *9th ANNUAL LOCAL GOVERNMENT LAW IN FLORIDA SEMINAR,* The Florida Bar Continuing Legal Education Committee And The Local Government Law Section; (March, 1986), p.8.10.